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In the Supreme Court of the United States

OCTOBER TERM, 1975

CARMEN BASTONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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NO.

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Carmen Bastone, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, *United States* v. *Bastone*, reported at 526 F.2d 971, is reprinted as Appendix A, *infra*.

Jurisdiction

The opinion of the Court of Appeals was entered on December 8, 1975. Petitioner's petition for rehearing and suggestion for rehearing in banc, timely filed, was denied

on February 12, 1976. (Appendix B, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Was there a variance between the indictment, charging a single conspiracy, and the proof, which at best showed a number of separate, unrelated conspiracies, at least one of which had completely terminated prior to petitioner's alleged involvement?

2. If there was such a variance, was it not prejudicial to petitioner in that the jury was permitted to consider against him evidence pertaining to separate conspiracies to which he was not a party, including acts and declarations of members thereof, and further, because the indictment did not adequately advise petitioner of the offense which he was called upon to defend?

3. May petitioner's conviction for conspiracy to *transport* stolen trailers in interstate commerce be upheld where the Court of Appeals' rationale for finding a single conspiracy—*i.e.*, that "the single objective of the conspiracy" was "the *sale* of stolen trailers," without regard for the federal jurisdictional nexus, and in an evidentiary framework which included purely local transactions?

4. Since there was, at the very least, a possibility of multiple conspiracies, was petitioner deprived of a fair trial where the trial court not only refused to instruct the jury per defense requests on this issue, but gave instead a *sua sponte* instruction intended to cure the prejudicial effects of possible variance but clearly insufficient so to do?

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5. Does not the Seventh Circuit's ruling on the multiple conspiracies issue conflict with principles announced by this Court in *Kotteakos* v. *United States,* 328 U.S. 750, with other Seventh Circuit decisions, and with decisions from other Circuits, particularly with respect to the necessity of giving thorough, careful cautionary instructions concerning the possible existence of multiple conspiracies whenever—as here—the evidence reasonably may so be construed?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor be deprived of life, liberty or property, without due process of law; . . ."

The statute for violation of which petitioner was convicted is 18 U.S.C. 371 (conspiracy), and the statute, violation of which was alleged to be the object of said conspiracy, is 18 U.S.C. 2314 (interstate transportation of stolen property). (This petition raises no issues regarding construction or application of these statutes.)

STATEMENT OF THE CASE

Petitioner, Carmen Bastone, was charged in a one-count indictment (74 CR 383, superseding 74 CR 223) with having conspired, with nineteen named co-defendants[1] and

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[1] Petitioner and seven others actually went to trial. Tried with petitioner by a jury were Salvatore Bastone, William Pullia, Vincent McMahon, Warren Eugene Jackson, James Colvett, Arthur Veal, and T. G. Grey. Grey was permitted to change his plea during trial, and the cases of the remaining defendants were submitted to the jury. Salvatore Bastone was acquitted; the remaining defendants on trial were found guilty. Only petitioner and Arthur Veal appealed; Veal's conviction was affirmed in the same opinion as was (Footnote continued)

four named but unindicted co-conspirators, and with others unknown to the grand jury, to transport stolen semi-trailers in interstate commerce. (R. 1)[2]

All motions, objections and requests for instructions by any of the defendants on trial were considered as adopted by all unless specifically disavowed. (Tr. 35-A, 80, 2228)

Petitioner's motion for directed verdict at the close of the government's case (R. 158) was denied (R. 162), and his motion for judgment of acquittal at the close of all the evidence (R. 167), taken under advisement, was denied (R. 210), together with his post-trial motions in arrest of judgment (R. 185) and for a new trial (R. 186), after the jury's verdict of guilty. (R. 176-77) The court sentenced petitioner to 5 years imprisonment. (R. 219)

(Footnote continued)

petitioner's. (See App. A.)

Defendant Lonero's case was severed prior to trial (due to his illness), (Tr. 3-A), and the remaining defendants all pleaded guilty prior to trial. Of these, Athas, Murray, Garner, Walley, and Schoenneman all testified for the prosecution, and Quagliato was called as a witness on petitioner's behalf. The remaining five defendants who pleaded guilty prior to trial (Falcione, Boenzi, Paradise, Marino and DeRosa) did not testify at trial.

[2] "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings, both on file in the Court of Appeals in No. 75-1417.

The indictment charged that from June 1, 1968 to December 31, 1972, petitioner and the others conspired, "with unlawful and fraudulent intent to transport and cause to be transported in interstate commerce from Chicago, Illinois to locations outside the State of Illinois, stolen semi-trailers of a total value in excess of $5,000.00, knowing the same to have been stolen, unlawfully converted and taken by fraud; in violation of Title 18, United States Code, Section 2314." (R. 1)

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Statement of Facts

As the prosecution's case developed, the evidence tended to show a number of separate, unrelated conspiracies, the only connecting link being Ronald Schoenneman, the prosecution's chief witness.

Schoenneman testified that in 1970 he was introduced to petitioner, to whom he explained the stolen trailer business. According to Schoenneman, petitioner subsequently arranged for various thieves to steal trailers for hire, with petitioner to get a percentage of the profits, after expenditures to the thieves, for titles, and for having stolen trailers cleaned and altered to reflect serial numbers matching the titles. Later, per Schoenneman, petitioner assisted Schoenneman in raising money to finance the operation. (Tr. 5, 9-11, 24, 45-49, 52-62)

Schoenneman also testified concerning a stolen trailer operation involving himself, unindicted co-conspirator Svehla, and co-defendant Murray, which entirely separate conspiracy was not alleged to have involved *any* of the defendants then on trial. (Tr. 35-40, 49, 71-74) Petitioner's motion for mistrial or to strike this evidence as being fatally variant from the allegations of the indictment (R. 144) was denied. (R. 145) There was also evidence of a separate conspiracy amongst Schoenneman and Murray involving the use of the O'Rourke Cartage yard at Calumet Harbor. (Tr. 168-71, 1123-33)

While the indictment charged a single conspiracy beginning on June 1, 1968 and continuing to December 31, 1972, Schoenneman's testimony demonstrates a separate conspiracy which began in 1968-69 involving himself, Gar-

ner[3] and Murray,[4] (Tr. 677), which ended completely in 1969-70, due to "heat" from the authorities; Schoenneman therefore went out of the "trailer business" for some 6 months to a year, per his own testimony. (Tr. 559, 678)

Aside from the testimony of Schoenneman, an accomplice witness who had received vast benefits from the government in exchange for his testimony,[5] petitioner was implicated only by the testimony of co-defendant Athas, (Tr. 1595-1600), and indirectly by testimony of a Mr. Gorbien. (Tr. 1559-72).[6] None of the other prosecution witnesses who testified after pleading guilty implicated petitioner in any way.

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[3] Garner had pleaded guilty prior to trial and testified for the government.

[4] Murray had pleaded guilty prior to trial and testified for the government.

[5] Schonneman in fact had received approximately $33,000.00 from the government (as of the date of petitioner's motion for new trial); the government had recommended probation in exchange for his "cooperation"; because of his "new identity" and secret whereabouts, in addition to securing the supposed governmental "protection" from those against whom he testified, he managed to avoid paying legitimate debts amounting to over $350,000.00; and, although he had filed no federal income tax returns during the indictment period, he apparently was not going to be prosecuted in connection therewith. Nor was he being prosecuted for numerous other offenses revealed in his testimony. (Tr. 4, 477-514, 528, 552-75; see R. 187, p. 4.)

[6] While prosecution witness Ponzevic testified that petitioner "may have been" the man who accompanied Schoenneman (Tr. 1162) in a meeting with the witness wherein the proposed purchase of used trailers (later consummated) was discussed, this purported identification was tentative at best.

Petitioner presented evidence: demonstrating Schoenneman's inaccessibility to service of process for collection of debts owed by him by virtue of his being in the "protective custody" of the government (Tr. 1814); contradicting Schoenneman on a crucial issue as to petitioner's allegedly having been present and having participated in an alleged conversation with trailer thieves (Tr. 1819-38); and corroborating his defense theory that his connection with Schoenneman in the purchase of used trailers was in furtherance of a legitimate business enterprise. (Tr. 1839-42).[7]

Refused requested defense instructions pertinent to the "multiple conspiracies" issue are reproduced in Appendix C, *infra*.

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[7] Although petitioner does not attack the legal sufficiency of the evidence, the posture of the government's case against him certainly was far from strong, which must be taken into consideration in determining the prejudicial effect upon his trial of the serious error urged herein.

REASONS FOR GRANTING THE WRIT

There was a prejudicial variance between the indictment, charging a single conspiracy, and the proof, which at best showed a number of separate, unrelated conspiracies, at least one of which had completely terminated prior to petitioner's alleged involvement. This resulted in prejudice to petitioner in that the jury was permitted to consider against him evidence pertaining to conspiracies to which he was not a party, including acts and declarations of members thereof, and further, because the indictment did not adequately advise him of the offense which he was called upon to defend.

At the very least, there was a possibility of multiple conspiracies; hence, the court's refusal to instruct the jury per defense requests on this issue—together with its giving a sua sponte instruction intended to cure the prejudicial effects of possible variance but clearly insufficient so to do—requires reversal.

The Seventh Circuit's express reason for finding a single conspiracy is its conclusion that "the single objective of the conspiracy" was "the **sale** *of stolen trailers,"* without regard for the federal jurisdictional nexus—as charged in the indictment—that defendant conspired with others to* **transport** *stolen trailers* **in interstate commerce.**

The Seventh Circuit's ruling on the multiple conspiracies issue conflicts with principles announced by this Court in Kotteakos v. *United States, 328 U.S. 750, with other Seventh Circuit Decisions, and with decisions from other Circuits, particularly with respect to the necessity of giving*

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*App. A, p. App. 11, text accompanying fn. 5.

thorough, careful, cautionary instructions concerning the possible existence of multiple conspiracies whenever—as here—the evidence reasonably may so be construed.

• • •

As the prosecution's case developed, the evidence tended to show a number of separate, unrelated conspiracies, the only connecting link being Ronald Schoenneman, the prosecution's chief witness. (See pp. 5-6, *supra.*)

It is obvious that these various transactions do not evidence a single, unified conspiracy, as alleged in the indictment. The only arguable connection amongst all the activities is Schoenneman.

This Court has declared that where multiple conspiracies are shown while a single one was charged, a conviction cannot stand if the jury may have considered against a defendant, acts and declarations of others in furtherance of one or more of the separate conspiracies to which he was not a party. *Kotteakos* v. *United States,* 328 U.S. 750 (1946). That, we submit, was exactly the case here.

The evidence as outlined above (pp. 5-6, *supra*), clearly showed multiple conspiracies, if any, rather than a single one as alleged in the indictment, under the criteria set forth in *Kotteakos,* its progeny, and even its predecessors.

The point was properly raised by appropriate motions below. (R. 144, 158, 187; Tr. 49, 71-74)

The evidence does not support a finding of one conspiracy. Petitioner's conviction therefore cannot stand. *United States* v. *Johnson,* 515 F.2d 730 (7 Cir. 1975); *Daily* v. *United States,* 282 F.2d 818, 821-22 (9 Cir. 1960); *Canella* v. *United States,* 157 F.2d 470, 477-78 (9 Cir. 1946); *United States* v. *Varelli,* 407 F.2d 735, 741-44 (7

Cir. 1969); *Rocha* v. *United States,* 288 F.2d 545, 551-53 (9 Cir. 1961); *Fernandez* v. *United States,* 329 F.2d 899, 904-05 (9 Cir. 1964); *Brooks* v. *United States,* 164 F.2d 142 (5 Cir. 1947); *United States* v. *Russano,* 257 F.2d 712, 715-16 (2 Cir. 1958); *United States* v. *Butler,* 494 F.2d 1246, 1254-57 (10 Cir. 1974); *Tinsley* v. *United States,* 43 F.2d 890, 892-93 (8 Cir. 1930); see *United States* v. *McDaniels,* 57 F.R.D. 171, 176 (E.D. La. 1972).

> "[W]here one general conspiracy is charged, proof of several conspiracies constitutes a variance, and . . . the harmless error rule . . . will not save a reversal where it is not made clear that no prejudice has resulted from the error." *Brooks* v. *United States,* 164 F.2d 142, 142 (5 Cir. 1947) (reversing and remanding).

Even if some of the defendants may properly be said to have participated in a single conspiracy, assuming such conspiracy existed, there is no evidence that petitioner was a party to any such conspiracy; at best, the evidence would tend to connect him with a sub-conspiracy involving only himself and Schoenneman, together with a few specified trailer thieves, which does *not* suffice to prove him part of any supposed over-all scheme.[8]

Arguably, petitioner was one of several sources from whom stolen trailers were obtained for fraudulent resale.

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[8] "[T]here is proof as to most, if not all, of the appellants tending to show complicity in one or more illegal enterprises or ventures having to do with distilled spirits. It is equally clear, however, that while the proof tends to connect some of the defendants in a common conspiracy, it completely fails to connect others of the defendants to that conspiracy. On the contrary, it tends to show the existence of, and to connect some of the defendants with, entirely separate and distinct conspiracies. . . . [I]t was reversible error to send them all to the jury under an indictment in one count charging one general conspiracy." *Brooks* v. *United States, supra,* at 143.

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Nothing demonstrates that he received any financial gain other than that flowing from the sale of trailers allegedly obtained through him. This does *not* suffice to hold petitioner criminally liable for the entire venture. *United States* v. *Braico*, 422 F.2d 543, 544 (7 Cir. 1970); *United States* v. *Ford*, 324 F.2d 950 (7 Cir. 1963).

Petitioner cannot stand convicted because the evidence does not permit the conclusion that he was aware of the scope of the supposed over-all enterprise and knowingly participated therein. *United States* v. *Falcone*, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401 (2 Cir. 1938); *Dennis* v. *United States*, 302 F.2d 5, 12 (10 Cir. 1962).[9]

Moreover, the variance permits the possibility that petitioner may have been convicted of an offense or offenses other than that concerning which the grand jury which returned the indictment heard evidence. This, too, is wholly impermissible. *Stirone* v. *United States*, 361 U.S. 212 (1960).

That the evidence in the case at bar showed, if anything, several conspiracies rather than a single conspiracy, is clear. *Compare* the facts in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and in the cases cited at pp. 9-10, *supra*, where multiple conspiracies were found to have been demonstrated, *with* the facts in *Blumenthal* v. *United States*, 332 U.S. 539 (1947), *Berenbeim* v. *United States*,

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[9] In *Dennis*, the court reversed as to all defendants, remanding some for new trial, stating:

> "Without knowledge, the intent to participate in an established conspiracy cannot exist, and '* * * to establish the intent, the evidence of knowledge must be clear, not equivocal.' *Ingram* v. *United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 3 L.Ed.2d 1503." 302 F.2d at 12.

164 F.2d 679 (10 Cir. 1947),[10] and *United States* v. *Calabro*, 449 F.2d 885, 892-94 (2 Cir. 1971),[11] where single conspiracies were found to have been proven.

Especially pertinent is *United States* v. *Russano*, 257 F.2d 712 (2 Cir. 1958), where the evidence showed that a narcotics conspiracy which began in 1952 ended late that year due to arrests, that none of its participants engaged in the narcotics business during 1953-54, and that some of the participants were "back in business" in 1955-56. Upon such evidence, the court reversed convictions for a single conspiracy alleged to have existed from 1952 to 1956. This closely parallels the facts herein with regard to Schoenneman's having gone "out of the trailer business" during the indictment period. (Tr. 559, 677-78)

Nor would the fact that petitioner may arguably be said to have been connected with one or more of the several conspiracies save the government's case; for in those cases affirming despite a showing of multiple conspiracies wherein a single one had been charged, the courts explicitly held that in each such case, the defendants clearly

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[10] In *Berenbeim*, while the court affirmed because on the evidence it found but a single conspiracy, the court noted:

> "It is well settled that where the indictment charges a single conspiracy and the proof establishes two or more different and disconnected conspiracies, the variance is fatal and a conviction cannot be sustained." 164 F.2d at 683.

[11] In *Calabro*, in direct contrast to the factual posture of the case at bar, the court concluded that:

> "Appellants' continuous involvement with each other provided the common thread upon which the jury properly could find the single conspiracy charged." 449 F.2d at 893.

No such evidence exists in the case at bar.

were demonstrated to have been parties to *each* of the separate conspiracies shown.[12]

Moreover, it has been held that even one who was a party to *all* of a number of separate conspiracies could not stand convicted therefor upon an indictment charging but a single conspiracy.[13]

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[12] See, *e.g.*, *United States* v. *Walker*, 453 F.2d 1205 (5 Cir. 1972) (one conspiracy charged, three shown, defendant connected with all three separate conspiracies); *cf. United States* v. *Benjamin*, 328 F.2d 854, 864 (2 Cir. 1964) (court concluded there was only one scheme despite contention that two were shown; but even if there were two, such argument "could not avail Benjamin in any event since the evidence clearly implicated him in both aspects of the scheme.").

[13] After reversing the convictions of two appellants who were shown to have been involved, at most, in conspiracies separate from the single one charged and not knowledgeable of any single conspiracy, the court proceeded also to reverse the conspiracy conviction of the most heavily involved of the defendants, characterized as the "mastermind," because of the fatal variance:

> "As for Fernandez, there is evidence connecting him with all of the substantive counts. And to the extent that there was a conspiracy, or were conspiracies, between two or more persons in connection with these and similar transactions, he, as the so-called 'mastermind,' was a direct participant therein, knew of any such conspiracy or conspiracies, and was aware of their nature and purpose.
>
> "But there is nevertheless *wholly lacking any evidence showing that there was a single over-all conspiracy to engage in these separate and distinct transactions which occurred at different times and places and involved varying persons and methods of operation. At most, the evidence establishes several diverse conspiracies radiating from Fernandez in all of which he participated*, and in one or two of which Dalgliesh and Pratt participated. *This being true, the conviction on the conspiracy count cannot stand even as to Fernandez* and, on this additional ground, it cannot stand as to Dalgliesh and Pratt." *Fernandez* v. *United States*, 329 F.2d 899, 905 (9 Cir. 1964) (footnote omitted; emphasis added).

As to the extent of petitioner's non-participation in an alleged unified conspiracy herein, see *United States* v. *Manarite,* 448 F.2d 583, 589-90 (2 Cir. 1971), which describes a conspiracy similar to that alleged in the case at bar, and, by way of contrast, demonstrates what is prerequisite to find that one is party to a single conspiracy; the factual elements held necessary, and found to exist in *Manarite,* are utterly lacking in the case at bar.

In several cases wherein defendants claimed on appeal that one, rather than several, conspiracies had been shown where it was to defendant's advantage that only one had been shown, the courts have found, on facts similar to those in the case at bar, that multiple conspiracies were properly found.[14]

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[14] For example, in *United States* v. *Cole,* 457 F.2d 1141 (9 Cir. 1972), defendant claimed double jeopardy, in that he was convicted under two indictments for conspiracy—one involving the manufacture of methamphetamine, and one involving its distribution. Noting that the persons and activities involved in the manufacturing operation were different from those involved in the distribution, *id.* at 1144, with the sole exception of defendant, who was common to both, the court found two conspiracies had been shown and therefore affirmed, stating:

> "The fact that there is one individual common to two separate criminal enterprises does not constitute them a single operation." *Id.* at 1145.

Similarly, in *United States* v. *Aviles,* 274 F.2d 179, 193-94 (2 Cir. 1960), two defendants (the brothers Lessa) maintained that since they had already been convicted in another case for participation in the same conspiracy, the instant conviction constituted double jeopardy. The court disagreed, holding:

> "Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one." *Id.* at 194.

Based upon all the foregoing, petitioner's conviction should be reversed for fatal variance between the charge and the proof.[15]

The Seventh Circuit's express reason for finding but a single conspiracy on the facts—aside from that set forth in footnote 15, below—was:

> "[T]he proof here plainly demonstrated one overall agreement among the various parties to perform dif-

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[15] In the face of petitioner's argument, the Seventh Court notes that some of the evidence of other conspiracies was adduced on defense cross-examination, rather than on direct examination by the prosecution, using this to justify a finding of one conspiracy: "We do not believe it would be fair to allow the defense to manufacture a variance through use of cross-examination of the government's chief witness." (App. A, p. App. 12, fn. 7) And in justifying refusal of requested defense instructions concerning multiple conspiracies, the court holds them "not appropriate where the defense attempts to create a variance through cross-examination by bringing in new conspiracies." (App. A, p. App. 12)

But the court wholly has overlooked that *the very first disclosure of an unrelated conspiracy came during the very beginning of the prosecution's case.* (Tr. 35-40, 49, 71-74) Defense motions for mistrial or to strike this evidence were denied. (R. 144-45) Additional evidence of an unrelated conspiracy was also adduced by the prosecution. (Tr. 168-71)

Clearly, once the prosecution brought out evidence demonstrating —at the very least—the possibility of multiple conspiracies as opposed to the single one as charged in the indictment, petitioner had a right to cross-examine the government's chief witness concerning those additional conspiracies, and indeed, defense counsel had a duty to his client to pursue this; if yet additional separate conspiracies thereby were disclosed, that they were disclosed on cross-examination rather than by the government must not be held to defeat petitioner's otherwise valid claim. This was *not* a situation of the defense, in bad faith, attempting to structure a case of multiple conspiracies where the government's proof showed only one; *it was during the government's case that possible multiple conspiracies first were disclosed.*

ferent functions in order to carry out the single objective of the conspiracy—*the sale of stolen trailers.*" (App. A, p. App. 11) (Emphasis added.)

This *completely* overlooks the fact that the indictment charged—as it must, to allege a conspiracy to violate federal law—that defendants conspired *to transport stolen trailers in interstate commerce.*[16]

The court acknowledges that "The evidence also showed a few collateral transactions that were not totally directed toward the main scheme or conspiracy." (App. A, p. App. 11) But the court goes on to hold that the trial judge's instructions were adequate. (App. A, p. App. 11)

They were not.

And therein lies the prejudice.

The instruction cited by the panel as "adequate", (see App. A, p. App. 11, fn. 6), *clearly* is inadequate to protect petitioner from the dangers of having the jury consider against him acts and declarations made by others in furtherance of something other than any conspiracy with which they might have found him to have been connected; for the instruction does not, nor do any other of the instructions given, allow for the consequences of the possibility that more than one conspiracy was shown.

At the very least, the court should have instructed the jury as to the necessity of finding a single conspiracy, as opposed to several, as prerequisite to conviction, rather than leaving them no option but to find one conspiracy, if they found any at all; and/or that if they found more than one, they could attribute as evidence against petitioner *only* such acts and declarations of others in furtherance of the same conspiracy or conspiracies of which they may have found petitioner to have been a member. *United*

[16] Such approach is especially erroneous where—as here—there was substantial evidence of purely local transactions. (*E.g.*, Tr. 105, 195-201, 268, 278, 294, 462-69.)

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States v. *Johnson*, 515 F.2d 730, 735-36 (7 Cir. 1975). Without such limiting instructions, petitioner was irremediably prejudiced by the variance between the indictment and the proof. Indeed, where the evidence is susceptible of an interpretation that more than one conspiracy may have been shown while only one was charged, failure to give such instructions, *even in the absence of a specific request therefor*, has been held plain error requiring reversal.[17]

In *Johnson, supra*, the court reversed because of the trial court's failure to give adequate instructions to prevent prejudice due to proof of multiple conspiracies; instructions which failed unequivocally to keep the jury from considering evidence pertaining to a conspiracy of which defendant was not a member required reversal.

The trial court refused various defense instructions aimed at the multiple conspiracy problem, (Def. C. Bastone's Inst. 18, Def. S. Bastone's Inst. Q, Def. McMahon's Insts. 42, 43 & 44) (set forth *infra*, App. C, p. App. 33-34), and instead gave its own instruction on the subject. (Tr.

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[17] *United States* v. *Borelli*, 336 F.2d 376, 382-87 (2 Cir. 1964); *United States* v. *Kelly*, 349 F.2d 720, 756-58 (2 Cir. 1965).

See *United States* v. *Griffin*, 464 F.2d 1352, 1357-58 (9 Cir. 1972) (affirming despite showing of multiple conspiracies where jury was given appropriate instructions covering such possibility and attenuating possible prejudice); *United States* v. *Varelli*, 407 F.2d 735, 746 (7 Cir. 1969) (reversing for showing of multiple conspiracies, stating that court should give appropriate instructions "when the possibility of a variance appears"); *United States* v. *Calabro*, 449 F.2d 885, 892-94 (2 Cir. 1971) (affirming because only one conspiracy shown despite defense contention that two were demonstrated, *id.* at 893, and noting that "[I]t is better practice to instruct the jury that they must acquit if they find multiple conspiracies when only one conspiracy is charged. . . ." *Id.* at 894).

2370; see Tr. 2290-94) [18] Conceding *arguendo* that the requested instructions may have asked for too much, [19] nonetheless the court's instruction was wholly insufficient because it did *not* advise the jury that acts and declarations of persons in furtherance of a separate conspiracy or conspiracies to which petitioner had not been connected could not be considered against him.

The general cautionary instruction relied on by the court, (App. A, p. App. 11, fn. 6), was insufficient as well,[19] because

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[18] The Court's only instruction touching upon the multiple conspiracy problem is as follows:

> "The indictment in this case charges a single criminal conspiracy participated in by the defendants and others within a specific period of time and for a specific purpose. To prove a defendant guilty, the Government must prove beyond a reasonable doubt that such defendant knowingly and willfully participated in this particular conspiracy at some time during the period alleged.
>
> However, the Government need not prove that all of the defendants participated in the alleged conspiracy or that they all participated at the same time. Evidence of some other conspiracy or some other illegal act does not constitute evidence of the specific conspiracy alleged in the indictment and is irrelevant to it." (Tr. 2370)

[19] *But see Fernandez* v. *United States*, 329 F.2d 899, 904-05 (9 Cir. 1964), discussed at p. 13, fn. 13, *supra*. According to *Fernandez*, the variance itself precludes conviction, as the requested instructions would have advised. *Accord*, *United States* v. *Calabro*, 449 F.2d 885, 894 (2 Cir. 1971).

[20] Instructions can be erroneous, requiring reversal, if under the facts of a particular case they are inadequate, inapplicable or confusing, even though they may correctly state abstract principles of law. See, *e.g.*, *United States* v. *Collier*, 313 F.2d 157, 159 (7 Cir. 1963); *Morris* v. *United States*, 326 F.2d 192, 194-95 (9 Cir. 1963); *United States* v. *Torrence*, 480 F.2d 564, 565 (5 Cir. 1973). Moreover, failure to relate the facts of the case to the law as stated in the instructions can constitute plain error. See *Choy* v. *Bouchelle*, 436 F.2d 319, 325 (3 Cir. 1970), a civil case cited with approval in *United States* v. *Rosenfield*, 469 F.2d 598, 601 (3 Cir. 1972).

it did not include any explicit reference to possible multiple conspiracies.

Where the evidence discloses multiple conspiracies, at the very least the court must give careful instructions limiting the use against an individual defendant of acts and statements of alleged co-conspirators in furtherance of a conspiracy to which defendant was not shown to have been a party. No such instructions were given here. Thus, petitioner's conviction may well be based, at least in part, upon the jury's improperly having considered against him evidence pertaining only to a conspiracy or conspiracies in which he was not involved. Since such inadmissible evidence may have contributed to petitioner's conviction, the conspiracy conviction should be reversed.

Even if multiple conspiracies have not been demonstrated as a matter of law,[21] since the evidence admits of the *possibility* of multiple conspiracies, *the issue as to multiple or single conspiracies should have been submitted to the jury under appropriate instructions.*

This mandatory procedure not having been followed, reversal is required.

In the Seventh Circuit's own language, from *United States* v. *Varelli*, 407 F.2d 735, 746 (7 Cir. 1969):

> "Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several. . . . [citations omitted] Therefore, . . . when the possibility of a variance appears, [the district judge] should instruct the jury on multiple conspiracies as well."

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[21] Compare *United States* v. *Johnson*, 515 F.2d 730, 733, 736 (7 Cir. 1975), where the court held as a matter of law that separate conspiracies, not the single conspiracy alleged, had been demonstrated by the evidence.

The prejudice herein lies in the realistic probability that the jury considered against petitioner evidence of acts and declarations of others in furtherance of a conspiracy or conspiracies with which petitioner had not been connected; for the jury was never advised that, if it found more than one conspiracy, such evidence was *not* to be considered against petitioner. This same danger, too, exists with regard to evidence of overt acts.

In *Kotteakos* v. *United States,* 328 U.S. 750, 774 (1946), this Court stated:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

Further discussing the specific kinds of prejudice suffered by a defendant connected with less than all of multiple conspiracies under an indictment charging but a single one, the Court held:

> "On these instructions[22] it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." *Id.* at 771. (Footnote added.)

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[22] The instructions the jury had been given in *Kotteakos,* set forth in *id.* at 767-70, are substantially similar to the jury charge in the case at bar, particularly in their common failure to limit the jury's consideration of evidence pertaining to possible separate conspiracies. This, too, was the vice requiring reversal of the conspiracy conviction in *Johnson, supra.*

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Evidence of possible separate conspiracies in the case at bar [23] was such as to require the giving of appropriate jury instructions pursuant to the foregoing authorities.[24]

While there was some evidence adduced from Schoenneman which may be susceptible of an interpretation that petitioner was involved in all illegal operations after mid-1970, the jury was not required to accept such interpretation or even to believe Schoenneman; and the question was never resolved under "appropriate judicial guidance," *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946), for the jury was given no alternatives, nor were they instructed regarding the consideration of evidence bearing on less than all of the possible multiple conspiracies.

Commenting on the need for careful limiting instructions—such as were omitted from the case at bar—this Court, in *Kotteakos, supra,* held:

> "The greater looseness generally allowed [in conspiracy prosecutions] for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. . . . [E]xtraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each de-

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[23] *I.e.,* the admitted hiatus and cessation of illegal activities by Schoenneman in 1969-70, (Tr. 559, 678); evidence of separate conspiracies involving Schoenneman, Garner and Murray in 1968-69 (Tr. 67); involving Schoenneman, Svehla and Murray (Tr. 35-40, 49, 71-74); and involving Schoenneman and Murray in a separate operation utilizing the O'Rourke Cartage yard at Calumet Harbor (Tr. 168-71, 1123-33).

[24] See also cases cited at p. 17, *supra,* and at p. 17, fn. 17, *supra.*

> fendant individually, as far as pos ible, from loss of identity in the mass. *Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct.*" *Id.* at 776-77. **(Emphasis added.)**

Indeed, it is this very "greater looseness generally allowed" which results in prejudice to a defendant where, as here, the government chooses to prosecute as a single conspiracy a case wherein the evidence demonstrates the possibility of separate conspiracies. Once trial has been had upon a single conspiracy theory—where, as here, the evidence is susceptible of demonstrating multiple conspiracies—the government has accomplished its purpose: to strengthen the possibility of conviction by exposing the jury to evidence under the relaxed principles applicable to conspiracy trials, capitalizing on the possibility that because of the possibility of multiple conspiracies, evidence not properly chargeable to a particular defendant will nonetheless be considered by the jury against him.

In view of the extreme importance of the questions presented herein to the administration of justice in the federal courts, and because the Seventh Circuit's decision conflicts with principles announced by this Court in *Kotteakos* v. *United States, supra,* with other decisions of the Seventh Circuit,[25] and with decisions from other Circuits[26]—particularly regarding the necessity of cautionary instructions where the possibility of multiple conspiracies exists—certiorari should be allowed.

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[25] *United States* v. *Johnson,* 515 F.2d 730 (7 Cir. 1975), and *United States* v. *Varelli,* 407 F.2d 735 (7 Cir. 1969).

[26] The decision herein conflicts with Second and Ninth Circuit decisions, cited at p. 17, fn. 17, *supra,* as to the necessity of giving appropriate instructions.

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Because of the prejudicial variance herein, and particularly since the jury may have considered against petitioner evidence pertaining to separate conspiracies to which he clearly was not a party, including evidence of acts and declarations of alleged co-conspirators with whom he was not in any way connected, and in furtherance of conspiracies to which he was not a party, petitioner's conviction should be reversed. In the alternative, the conviction should be reversed and remanded for a new trial at which petitioner must receive appropriate protection through the use of careful instructions concerning multiple conspiracies and limiting the use of such evidence.

He received no such protection in the case at bar.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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